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No. 06-84 and 06-100

In the Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, et al.,

Petitioners,

v.

CHARLES BURR, et al.,

Respondents.

GEICO GENERAL INSURANCE COMPANY, et al.,

Petitioners,

v.

AJENE EDO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of the States of Oregon, Arizona, Arkansas, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maryland, Minnesota, Missouri, Montana, New York, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming
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QUESTIONS PRESENTED

The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, requires users of credit reports, including insurance companies, to provide notice to consumers against whom they take any "adverse action" based in whole or in part on any information contained in a credit report, and to inform the consumer of the right to obtain a copy of the report and to challenge its contents. 15 U.S.C. § 1681m(a). When a user of credit reports violates the notice requirements "willfully," as opposed to negligently, it may be liable for punitive damages. 15 U.S.C. § 1681n(a). The questions presented are:

1. Whether an insurance company takes an "adverse action" under § 1681m(a) by charging an insurance customer a higher insurance rate based at least in part on his or her credit report, when the customer would have been charged a lower rate if his credit information had been more favorable.

2. Whether, in order to have "willfully" violated the Fair Credit Reporting Act's requirements, a company must have actual knowledge that it is violating the Act's requirements, or if it is sufficient that the company act in reckless disregard of a consumer's rights under the Act.

3. If reckless disregard is sufficient to establish willfulness, whether a company may avoid further scrutiny into whether it willfully violated the Act by relying on a merely "colorable" interpretation of what constitutes an "adverse action" triggering the Act's notice requirement, as opposed to establishing that its erroneous interpretation was objectively reasonable.

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INTEREST OF THE STATE *AMICI*

The undersigned Attorneys General submit this brief on behalf of their respective States and pursuant to Rule 37.4. Congress enacted the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports for business purposes. To those ends, the Act gives consumers the right, among other things, to receive notice from companies that consider a consumer's credit report as one basis for taking an adverse action against him or her, 15 U.S.C. § 1681m(a), and federal agencies may seek damages for negligent or willful violation of the Act's requirements. 15 U.S.C. § 1681n(a), 15 U.S.C. § 1681o; 15 U.S.C. § 1681m(h)(8). The States retain enforcement rights under the FCRA generally, 15 U.S.C. § 1681s(c), although the FCRA preempts state fair credit reporting laws to the extent they are inconsistent with the federal Act. 15 U.S.C. § 1681t. Accordingly, the State *amici* have a strong interest in the proper construction of provisions in the Act pertaining to "adverse actions" and "willfulness."

SUMMARY OF ARGUMENT

I. The Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, requires users of credit reports to notify consumers when they have used a consumer's report to take any adverse action against him or her. 15 U.S.C. § 1681m(a). An adverse action, as the Act defines it, includes an increase in any charge for any insurance, existing or applied for. 15 U.S.C. § 1681a(k)(1)(B)(i). In determining whether it had taken an adverse action against a consumer based on his credit report, GEICO Companies

compared the rate it charged him based on his actual credit report with the rate it would have charged him if he had had a neutral or average credit score. Where, as in Edo's case, the rate charged would not have been higher based on consideration of an average credit score, GEICO determined that it had not taken an adverse action against the consumer and therefore did not provide an adverse action notice.

GEICO erroneously interpreted its duty to provide adverse impact notices. The purpose of the adverse action notification requirement is to alert consumers to potential mistakes in their credit reports so that they may investigate and, if appropriate, challenge the information. But GEICO's policy would not alert a person with good credit that he would have received a better insurance rate if he had had better credit, and thus would deny him an opportunity to correct any mistakes in his report. Nothing in the Act limits adverse actions to situations in which a person with an average or poor credit score is charged a higher insurance rate based in part on his report. Thus, a company takes adverse action against a consumer whenever a more favorable credit report would result in a lower insurance rate.

II. In the civil context, willfulness may encompass not only a knowing violation of the law, but also reckless disregard of whether one's conduct is unlawful. The context, structure, and purposes of the FCRA demonstrate that Congress intended a willful violation of the Act's requirements to include reckless disregard for the rights of consumers. That was an accepted view of the *mens rea* required for willful violation of civil statutes at the time

the FCRA was enacted. Moreover, when Congress wished to require a knowing violation, rather than mere willfulness, in order to impose liability, it used that term. The FCRA represents Congress's attempt to balance the benefits to users of consumer credit reports with the rights of consumers to notice and other protections. Construing willfulness to include a company's reckless disregard of a consumer's rights under the Act best effects that balance and Congress's intent.

III. Because some of GEICO's and Safeco's interpretations of their statutory duties to consumers were implausible, the Ninth Circuit properly determined that they were not entitled to summary judgment on the issue of whether they violated the Act's provisions willfully. Absent other evidence of willful noncompliance, when a company acts on an interpretation that is reasonable but erroneous, willfulness cannot be found. On the other hand, when a company reaches an implausible interpretation of its duties and that interpretation results in a violation of consumer rights, further inquiry into the company's subjective good faith is appropriate. Having received the benefit of use of consumer credit reports, a company should not escape liability for willful conduct, as a matter of law, based solely on its advancement of a "colorable" argument in support of its action. Requiring companies in a highly regulated industry to make a good faith attempt to determine its duties to consumers is not an onerous standard.

ARGUMENT

I. An insurance company takes an "adverse action" against a consumer whenever, after considering the consumer's credit report, it charges the consumer a higher rate than it would have charged, had the consumer's report been more favorable.

15 U.S.C. § 1681m(a) imposes on users of consumer credit reports the duty, among others, to provide notice to all consumers against whom they have taken an adverse action based in any part on information obtained in their consumer credit reports. During the relevant period in this case, the GEICO Companies deemed an action with respect to an individual's automobile insurance rates "adverse," therefore triggering the notice requirement, only if the rate charged was greater than it would have been if the individual's credit information had been neutral, meaning average. *Reynolds v. Hartford Financial Services Group*, 435 F.3d 1081, 1089, 1092-93 (9th Cir. 2006). The Ninth Circuit held that GEICO's interpretation and resulting policy violated the Act, because an adverse action takes place whenever a consumer (whose credit report was considered) would have been charged less for his insurance, had his credit information been more favorable. *Id.* at 1093. That followed, the Ninth Circuit reasoned, because those consumers with higher-than-average credit scores, as well as those with average or below-average scores, are entitled to know when a better rating would result in their being charged less for their insurance. *Id.*.

The Ninth Circuit was correct. The FCRA defines an "adverse action" to include, in part, "an increase in any

charge for [insurance] * * * applied for" based on the information in a credit report. 15 U.S.C. § 1681a(k)(1)(B)(i). Nothing in that language limits adverse actions to ones in which the consumer is charged a higher rate than he or she would have been charged, had the consumer had an above-average, rather than below-average, credit score. In other words, as the Ninth Circuit pointed out, a consumer is entitled to notice whenever he or she would have received a more favorable rate based on a better consumer credit report. In the cases of consumers with better-than-average credit reports, comparing the rates they are charged to the rates charged individuals with average credit scores ignores that those with excellent scores may nevertheless suffer higher rates than they should, based on mistakenly low credit ratings.

Construing "adverse actions" broadly to include all cases in which a consumer would have been charged less for his insurance, had his credit information been more favorable, is the only interpretation consonant with the purposes of the FCRA's notice requirements. Congress enacted the FCRA to protect consumers from flaws in the credit reporting system and to improve the integrity and reliability of credit reports. *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001); S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). To those ends, the Act gives consumers the right to see their credit reports; sets forth procedures by which consumers may challenge and correct their reports; and requires that users of reports give affected consumers notice of any adverse actions taken based on the reports. 15 U.S.C. § 1681g; 15 U.S.C. § 1681i; 15 U.S.C. § 1681m(a). Under GEICO's narrow reading of "adverse action," a person may be charged more for his

or her insurance based on an inaccuracy in his or her credit report, yet never receive notice of that adverse action and thus never have reason to challenge or correct the report. Such a reading is not supported by the text of the Act, and it serves to defeat Congress's purpose of improving credit report reliability: An adverse-action notice may be the only practical way for a consumer to learn that the credit report used by the insurance company was erroneous and therefore take steps to correct it.

GEICO's contention that requiring adverse-action notices in situations like Edo's would confuse and desensitize consumers to the notices' import is unpersuasive. (*See* GEICO Br. 22). It is not difficult to tell a consumer that had his credit score been better, he would have received a better insurance rate. And if a consumer believes that he has impeccable credit, he is entitled to be alerted to the fact that his credit report reflects otherwise. Given that for most individuals, applying for or changing their insurance policies is not a daily occurrence, there is no genuine cause for concern that consumers will be flooded with too much information.

II. An insurance company that violates the FCRA in reckless disregard of a consumer's rights acts "willfully" for purposes of 15 § U.S.C. 1681n.

The Ninth Circuit also held that when an insurance company intentionally acts either with knowledge or in reckless disregard of a consumer's rights under the FCRA, its violation is willful, making it liable for punitive damages. *Reynolds*, 935 F.3d at 1098. The Ninth Circuit determined that that definition "best comports" with this Court's consistent statements in the context of

civil, as opposed to criminal, liability. *Id.* (citing, *e.g.*, *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985)). Further, as the Ninth Circuit explained, that approach "best furthers the purposes and objectives of the Act." *Reynolds*, 935 F.3d at 1099. The court distinguished a negligent violation—"a truly excusable inability to predict future developments in the evolving construction of a statute by the courts"—from "noncompliance even though the answer to a previously undecided question is objectively apparent," which exhibits willfulness. *Id.*

That conclusion is also correct. First, as the Ninth Circuit observed, willfulness consistently has been construed differently, depending on whether that term is used in a civil or criminal context. In the civil context, willfulness means both knowing and reckless disregard of a defendant's legal obligations, particularly where the action is taken to enforce a party's compliance with duties designed to protect federal statutory rights. *See, e.g.*, *Thurston*, 469 U.S. at 128; *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 614 (1993) (willful violation of Age Discrimination in Employment Act encompasses "reckless disregard for the matter of whether [a party's] conduct was prohibited"); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (same under Fair Labor Standards Act); *United States v. Illinois Cent. R. Co.*, 303 U.S. 239, 242-43 (1938) (in civil context, willful includes attitude of a defendant who is "plainly indifferent" to a statute's requirements). The Ninth Circuit's similar conclusion in the context of the FCRA is plainly consistent with those previous holdings.

Indeed, construing willful non-compliance to include reckless disregard of the Act's consumer protection provisions is compelled by the Act's text. Congress is presumed to have said what it meant and meant what it said. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Interpretations that render statutory language superfluous are disfavored. *Id.* at 253. In the case of the FCRA, when Congress wished to require proof of a knowing violation in order to impose liability, it did just that. *See, e.g.*, § 1681n(a)(1)(B) (imposing liability for actual and punitive damages to consumers for "obtaining a consumer report under false pretenses *or knowingly without a permissible purpose*"; emphasis added); § 1681n(b) (imposing liability for actual damages to consumer reporting agency not less than $1,000 on any person "who obtains a consumer report from a consumer reporting agency under false pretenses *or knowingly without a permissible purpose*"; emphasis added). Notably, in § 1681q, Congress provided criminal liability for "[a]ny person who *knowingly and willfully* obtains information on a consumer * * * under false pretenses." 15 U.S.C. § 1681q (emphasis added). Thus, Congress made a conscious choice to require *knowing and willful* conduct for purposes of criminal liability under that section, while determining that the lesser standard of willfulness—knowing *or reckless* disregard of consumer rights—is sufficient to establish civil liability for noncompliance under § 1681n(a).

That standard is also implicit in the structure of the FCRA. The Act imposes both benefits and responsibilities on users of consumer credit reports. Insurance companies may use consumer credit reports in determining

the rates it will charge to issue an insurance policy to an individual, 15 U.S.C. § 1681b (a)(3)(C), but in exchange, the company must notify individuals of any adverse action taken, based in some part on those reports. 15 U.S.C. § 1681m(a). When a company fails to comply with its statutory duties, it undermines Congress's goal to improve the accuracy and fairness of consumer credit reports. Additionally, it creates an imbalance of power between the company and the consumer. In that context, demanding a relatively high standard of care for violations of consumer rights makes sense. As part of a highly regulated industry, insurance companies should not be permitted to obtain the benefit of using consumer credit reports as permitted under the FCRA, while recklessly disregarding their statutory obligations to consumers at the risk of only minimal financial liability.

As the Ninth Circuit opined, to conclude otherwise would "create perverse incentives" for credit report users to pursue a policy of deliberate ignorance of the law in order to avoid liability for punitive damages. *Reynolds*, 435 F.3d at 1099. Under such a policy, an insurance company "could make the economic calculation that it is less expensive to simply ignore the law, stonewall consumers, and then pay compensatory damages for negligent violations that give rise to litigation, rather than open its eyes and pay the cost" of providing adverse-action notices to those entitled to them. *See Apodaca v. Discover Financial Services*, 417 F. Supp. 2d 1220, 1220 (D.N.M. 2006) (noting similar incentive for credit-reporting agencies). Congress clearly chose to impose liability for reckless disregard of consumer rights, because it provided damages for both negligent and willful

noncompliance. Given that "Congress did not intend to enable mass-users of credit reports to evade meaningful liability for repeated violations of their 'grave responsibilities' under the FCRA by sticking their heads in the sand and pleading ignorance of the law," such reckless disregard should be deemed willful, not merely negligent. *See Mathews v. Gov't. Employees Ins. Co.*, 23 F. Supp. 2d 1160, 1164 (S.D. Cal 1998).

III. To avoid further scrutiny into a company's subjective intent in violating a consumer's rights under the FCRA, the company must show that its interpretation of a previously unconstrued statutory requirement was reasonable, not merely "colorable."

The remaining question is when a company should be entitled to summary judgment based on lack of its willfulness in violating consumer rights under the FLCA. On that issue, the United States' *amicus* brief argues that the Ninth Circuit misapplied the correct standard for reckless disregard of consumer rights under the Act. According to the United States' *amicus* brief, "recklessness entails action or inaction 'in the face of an *unjustifiably high risk* of harm' or unlawfulness[.] (United States Br. 21) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)) (emphasis added in United States' *amicus* brief). The United States argues that "reckless disregard in the civil context is, at bottom, an objective standard." (United States Br. 22). Further, that brief argues, the Ninth Circuit conflated the initial question of the objective reasonableness of GEICO's interpretation of an "adverse action" into the ultimate question of whether GEICO acted in subjective

good faith. (United States Br. 23-24). The United States *amicus* brief concludes that because "courts must undertake an objective inquiry to determine whether the defendant's conduct reflected a *colorable* interpretation of the law," and because the circumstances—including that the meaning of an "adverse action" was one of first impression—did not pose an objectively high risk that GEICO's interpretation of the FCRA's notice requirement was wrong, the trial court correctly granted the company summary judgment. (United States Br. 22, 29-30).

The State *amici* agree that recklessness requires, as an initial matter, an inquiry into the objective reasonableness of a party's conduct. *See, e.g, Farmer*, 511 U.S. at 836-37. But in this case, contrary to the United States' understanding, the Ninth Circuit *did* consider the objective reasonableness of GEICO's conduct, holding that "at least some of [the company's] interpretations [were] implausible." *Reynolds*, 435 F.3d at 1099. Having made that objective determination, the question before the court was what that meant for GEICO's summary judgment motion. The court determined that, because GEICO had reached at least some implausible interpretations of its statutory obligations, it was appropriate to remand to the district court to inquire further into the company's subjective good faith.[1] *Reynolds*, 435 F.3d at 1099.

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[1] Similarly, in Safeco's case, the Ninth Circuit held that the defendant companies' argument that their conduct was not willful failed in light of *Edo. Spano v. Safeco Corp.*, 140 Fed. Appx. 746, 2005 U.S. App. LEXIS 16308 (9th Cir. 2006).

Thus, the United States' disagreement with the Ninth Circuit does not appear to be so much with the order of inquiry—*i.e.*, whether to inquire into the objective reasonableness of the defendant company's conduct before examining its subjective good faith—as it is with what objective standard to apply to the company's interpretation of its statutory duties. As the United States' *amicus* brief points out, the Ninth Circuit indicated that where a company has "diligently and in good faith attempted to fulfill its statutory obigation and to determine the correct legal meaning of the statute and has thereby *come to a tenable, albeit erroneous, interpretation* of the statute," it "will not have acted in reckless disregard of a consumer's rights," as a matter of law. *Reynolds*, 435 F.3d at 1099. (Emphasis added). By contrast, in the apparent view of the United States, a company should escape liability for willful violation of a consumer's rights when, in the face of a requirement that has not previously been construed by a court, a company acts on a "colorable" interpretion of its duties. In the view of the State *amici*, in the specific context of the FCRA, as opposed to a criminal or some other civil action, the Ninth Circuit's rule is the better one.

As noted, the insurance industry is highly regulated. Like consumer reporting agencies, such users of reports have "grave responsibilities" under the FCRA. *See* 15 U.S.C. § 1681(a)(4). In light of the benefits that the Act accords users of reports, it is not overly onerous to require them to make a good faith effort to correctly determine their statutory responsibilities. In other words, although merely coming to an erroneous intepretation of such duties does not establish a willful violation of the

Act, a company's reliance on a flatly implausible interpretation of its duties should trigger further inquiry into its subjective good faith.

Requiring only a "colorable" argument that a company has fulfilled its statutory duties should not be the test, even when the interpretive question is one of first impression. That would give companies too much leeway to consciously avoid their responsibilities under the Act, no matter how clear, and risk only minimal damages until a consumer or other actor forces the issue to resolution through litigation. A "colorable" interpretation may be highly likely to be erroneous, thereby posing a high risk that, in acting on it, the company will violate consumer rights. Accordingly, proffering only a "colorable" interpretation should not be sufficient to foreclose a finding that a company violated consumer rights with reckless indifference to the law.

Finally, as the Ninth Circuit observed, further consideration of a company's subjective good faith will not always equate with a finding that it has violated the Act willfully. Upon further inquiry, a number of factors may come into play in making that determination, including whether the company justifiably relied on the advice of counsel, whether its violations of the Act were isolated, as opposed to an established policy affecting many consumers, whether its relationships with particular consumers evidenced a hostility to obeying the law, and how company executives reached the decision. *See Reynolds*, 435 F.3d at 1099. The only question at this stage, however, is whether an insurance company should be allowed to avoid statutory or punitive damages under § 1681n as

a matter of law because it offered a merely colorable (and wrong) interpretation of one of its duties under the FCRA. Because the FCRA's purposes of increasing the accuracy and reliability of consumer credit reports is best furthered by requiring credit report users to make a good faith determination of their statutory duties to consumers, the Ninth Circuit properly determined that neither GEICO nor Safeco was entitled to summary judgment.

Although numerous states have enacted, or may enact in the future, statutes intended to further fair credit reporting, the FCRA is this nation's central and primary mechanism for protecting consumer rights in the credit report arena. The responsibilities that the Act imposes on credit report users should be construed in a manner that takes into account the consumers' weighty interests in reports that are accurate and fairly compiled. Companies that do not make a good faith effort to comply with the Act's adverse-action notice requirement should not escape meaningful liability by acting on a strained and narrow interpretation of that responsibility. Reliance on an implausible and erroneous interpretation should be sufficient to trigger further inquiry into whether a company has violated the Act willfully.

CONCLUSION

For the reasons stated above, the Ninth Circuit's judgment should be affirmed.

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